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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

IGNACIO JUNIOR IXTA,

Defendant and Appellant.

2d Crim. No. B230515
(Super. Ct. No. 2009046630)
(Ventura County)

A jury found Ignacio Junior Ixta guilty of premeditated attempted murder (Pen. Code, § 187, subd. (a), 664), shooting at an inhabited dwelling (§ 246) and assault with a deadly weapon (§ 245, subd. (a)(1)).¹ The jury also found true that Ixta personally inflicted great bodily injury (§ 12022.7, subd. (a)) and that he personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). We affirm.

FACTS

On December 3, 2009, Miguel Cortez lived with his girlfriend, Brenda Cervantes, in a converted garage in Oxnard. Cervantes's father owned the house to which the garage was appurtenant. At around 7:00 p.m., Cortez picked up Cervantes at her work and drove her home. As Cortez was parking the car, he thought he saw his friend,

¹ All statutory references are to the Penal Code unless stated otherwise.

Alonzo, standing in front of a house across the street. When Cortez began walking toward the man, he realized it was not Alonzo. Instead, he was walking toward Ixta.

Ixta told Cortez he is from Colonia; that is, he is a member of the Colonia Chiques street gang. Cortez is a member of a "tagging crew," known as "Hardest Around" or "HA." Colonia and HA are rivals. Cortez responded, "I don't give a fuck where you're from. Don't start shit around here." Ixta was wearing a Converse shirt with a large white star. Cortez understood the white star to indicate allegiance to the Colonia gang.

Cervantes heard the argument between Cortez and Ixta. When she turned toward the argument, she got a good look at Ixta.

Cortez and Cervantes went inside the house. Cortez told Cervantes that the man he had spoken with is from the Colonia gang. Cervantes went outside and locked the gate.

At about 8:00 p.m., Ramon Alvarado, one of Cervantes's relatives, was standing in the front yard of the house. Ixta approached Alvarado and asked for "Michael." Ixta appeared not to know exactly who he was looking for. Thinking Ixta was one of Cortez's friends, Alvarado told Cortez that someone was looking for him.

Cortez thought his friend, Alonzo, was looking for him. When Cortez went outside, he saw it was Ixta. Another man wearing a Dallas Cowboys jacket was with Ixta. Cortez started to return to the house. Ixta called to him to wait. Cortez replied, "[N]o, get out of here. If you guys want to get even, I'll bring my friends. We'll get even, you know, but not right here."

Cortez backed up as Ixta moved toward him. Cortez said, "I don't want problems here. Just leave." Ixta pulled out a gun and shot at Cortez. The gun misfired. Cortez turned to run, and Ixta shot him in the back. The bullet went through Cortez and landed in a wall inside the house. The house was occupied by six people at the time.

Cortez was transported to the hospital by ambulance. While he was on the gurney or in the ambulance, he told the police it was too dark to see who shot him. He said that to avoid retaliation. He wanted the police to leave him alone.

At the hospital, a police detective showed Cortez a photographic six-pack lineup. Within five to seven seconds, he identified Ixta as the shooter. Cortez only told the police he thought it was Ixta. In fact, Cortez had no doubt it was Ixta, but he was afraid the police would not be able to protect him.

Cortez identified Ixta at trial. He explained he decided to cooperate with the police after he saw the hospital bills and after he talked with his sister. He decided Ixta should be responsible for what he did.

Cervantes also picked Ixta out of a photographic lineup. She told the police she was unsure of the identification. She said she was unsure because she was afraid of retaliation. At trial, she identified Ixta as the man who argued with Cortez. She said she had the opportunity to see Ixta clearly in good lighting. She did not see the shooting, but she heard the gunshot.

Detective Alex Arnett of the Oxnard Police Department testified as a gang expert. He said respect is "huge" for a gang member. It gives a member acceptance and power within the gang. A member gains respect by backing up the gang; that is, being willing to give up his life or freedom for the gang. Any type of disrespect for the gang brings retaliation. One way to be admitted to a gang is to commit an assault for the gang, including a shooting.

Detective Arnett said Ixta is an associate of the Colonia Chiques gang. Gangs do not let just anyone associate with them. There is a lot of trust involved. Associates commit crimes for the gang to prove themselves and gain respect. It would be disrespectful for someone to tell a gang member or associate, "I don't care where you're from."

Colonia gang attire includes Dallas Cowboys and Converse clothing. Police found a pair of Dallas Cowboys gloves in Ixta's home. Having a pair of Dallas Cowboys gloves is consistent with being a Colonia associate.

DISCUSSION

I

Ixta contends the trial court erred in allowing Cervantes to testify that Ixta shot Cortez.

During Cervantes's testimony, she stated a number of times that she did not see the shooting or anyone running away. But when the prosecutor stood behind Ixta and asked who he is, Cervantes replied, "That's the person that shot [Cortez]" Ixta objected and moved to strike the statement for lack of foundation. The trial court overruled the objection. Immediately after the court overruled the objection, Cervantes stated, "He's the person that I saw standing in front of my house."

The testimony of a lay witness is inadmissible unless the witness has personal knowledge of the facts to which she testifies. (Evid. Code, § 702, subd. (a).) Here Cervantes admitted she did not see the shooting or anyone running away. It was error for the trial court to overrule Ixta's objection and deny his motion to strike. Nevertheless, the error was harmless.

Cervantes's testimony made it plain she did not see the shooting. In addition, immediately after the court overruled Ixta's objection, Cervantes corrected herself. She said, "He's the person I saw standing in front of my house." Moreover, Cortez identified Ixta as the shooter. Cortez viewed Ixta at close range. Cortez also explained that his initial identification was equivocal because he feared retaliation. There is no reasonable probability Ixta would have obtained a more favorable result in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II

Ixta contends the trial court erred in admitting expert testimony on gangs.

Ixta argues that the gang evidence was not relevant. He relies on the prosecutor's statement during his opening argument that, "[T]he defendant is not being charged with being an active gang member." But the absence of a gang charge does not mean that gang evidence is irrelevant.

Gang evidence may be relevant in cases not involving a gang enhancement by helping to prove identity, motive, specific intent and other issues pertinent to guilt of the charged crime. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

Here gang evidence was not only relevant to prove identity, motive and specific intent, it is also relevant to explain why Cortez's and Cervantes's initial identification of Ixta was equivocal.

Ixta argues there is no issue as to motive or intent. He claims he never contested the shooter's motive or intent. He only contested that he was the shooter. But Ixta's plea of not guilty put at issue all the elements of the offense. (*People v. Steele* (2002) 27 Cal.4th 1230, 1243.) Even where the defendant concedes an element of the offense, the prosecution is still entitled to prove its case. (*Ibid.*)

Ixta argues the gang evidence is irrelevant to show identity. He cites *People v. Memory* (2010) 182 Cal.App.4th 835, 859, for the proposition that "Gang evidence at trial should not be admitted where its sole relevance is to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. [Citations.]" (Quoting *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.)

But here the relevance of the gang evidence was not solely to show Ixta's criminal disposition or bad character. Instead, gang evidence is relevant to the inextricably related issues of motive, intent and identity.

Ixta argues there is no evidence he was a gang member or associate. He claims evidence that he owned Dallas Cowboy gloves or that he was seen "'hanging out"' with gang members is insufficient. The argument ignores that when Cortez first approached Ixta, Ixta told him he was from the Colonia gang. There is more than ample evidence of Ixta's gang association.

Ixta argues that even if some gang evidence is admissible, expert testimony about gang retaliation was unnecessary. Ixta points out that Cortez and Cervantes both testified about their fear of retaliation. But the gang evidence was admissible to bolster the credibility of Cortez's and Cervantes's testimony.

Finally, Ixta argues the gang evidence should have been excluded under Evidence Code section 352. The trial court has the discretion under Evidence Code section 352 to exclude evidence where its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice.

Here, without gang evidence, the prosecution would be left with a shooting without motive or intent, and witnesses who initially gave an equivocal identification of the shooter. The gang evidence here was highly relevant and substantially outweighed the danger of undue prejudice.

The judgment is affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Charles W. Campbell, Jr., Judge

Superior Court County of Ventura

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